

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA**

KAREN DEAUNCE HORNBEAK,

Plaintiff,

v.

DR. STEPHEN HUTCHINS, et al.,

Defendants.

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Case No. CIV-06-471-RAW

ORDER

Before the Court is the joint motion of the defendants to dismiss. Movants represent that the pro se plaintiff did not appear for her properly-noticed deposition on April 8, 2008. Defendants seek dismissal or, in the alternative, an order directing plaintiff to appear for deposition. Defendants also seek an award of expenses. Plaintiff has not responded to the motion.

Rule 37(d)(1)(A)(i) F.R.Cv.P. grants the court authority to impose sanctions if a party fails to appear for that person's properly-noticed deposition. Such sanction may include dismissal of the action. *See* Rule 37(d)(3) & Rule 37(b)(2)(A)(v). In light of plaintiff's failure to respond to the present motion, the court considered the sanction of dismissal without prejudice. Pursuant to Rule 37(d)(3), however, it appears such a sanction would have to be coupled with an award of expenses. That Rule states in part that an award of reasonable expenses must be imposed "[i]nstead of or in addition to" other sanctions. Thus,

for example, if the court decides to impose sanctions* this may take the form of expenses alone or expenses plus dismissal. Dismissal alone is evidently not an option.

The court finds that dismissal and an award of expenses is too severe a sanction in this case. Also, the court has considered the factors set forth in *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir.1992), and concludes dismissal (albeit without prejudice) will not be imposed at this time.

It is the Order of the court that the joint motion of the defendants (#42) is hereby DENIED in part and GRANTED in part. The motion is denied to the extent it seeks dismissal of plaintiff's action.


The motion is granted to the extent that plaintiff is hereby ordered to appear for deposition upon further reasonable notice of the defendants and plaintiff is advised that any further failure to cooperate in discovery may result in dismissal of her case.

The motion is also granted to the extent that plaintiff is ordered to pay the defendants' reasonable expenses, including reasonable attorney's fees, incurred in attending the scheduled deposition and making a record thereon upon plaintiff's failure to appear.

ORDERED THIS 1st DAY OF MAY, 2008.

Dated this 1st Day of May 2008.

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Ronald A. White
United States District Judge
Eastern District of Oklahoma

*Rule 37(d)(1)(A) states that the court may impose sanctions upon motion.